

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
Connect America Fund)	Docket Nos. WC Docket No. 10-90
A National Broadband Plan for Our Future)		GN Docket No. 09-51
High-Cost Universal Service Support)	WC Docket No. 05-337

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULEMAKING

**COMMENTS OF
ALEXICON TELECOMMUNICATIONS CONSULTING**

Alexicon Telecommunications Consulting (“Alexicon”) hereby submits its Comments to the Federal Communications Commission (“FCC” or “Commission”) in response to the Commission’s Notice of Inquiry and Notice of Proposed Rulemaking (“NOI/NPRM” or “Proposal”) regarding Connect America Fund, A National Broadband Plan for Our Future and High-Cost Universal Service Support.¹ In this Notice, the Commission seeks comment on the issues raised in the NOI/NPRM.

GENERAL

Alexicon provides professional management, financial and regulatory services to a variety of small rate-of-return Incumbent Local Exchange Carriers (“ILECs”)² who serve diverse geographical areas characterized by rural, insular or Native American Tribal Lands. These ILECs, similar to most other small rate-of-return regulated ILECs, currently provide a wide range of technologically advanced services to their customers. These small ILECs, through participation in various State and Federal high cost funding programs, and with their continued investment in network infrastructure, are providing customers in rural, insular and Tribal lands

¹ Adopted: April 21, 2010 Released: April 21, 2010

² As defined by the Telecommunications Act of 1996 (“Act”)

with services equal to or greater than urban areas, and at comparable pricing. These ILECs are committed to providing their customers with state-of-the-art services, including Broadband and IP-enabled services. The stated and implied purposes of, and the issues raised in the NOI/NPRM, are of particular import to our clients who are all highly dependent upon Universal Service Funding to recover the higher cost of providing services to their customers, compared to larger, more urban service providers.

Alexicon's clients range in geographic size from single wire-center companies to larger providers with multiple wire-centers. All of Alexicon's clients are dependent upon the flow of funds from the Federal High-Cost Universal Service Fund ("USF") to assist in serving their rural customers at reasonable rates for local exchange and access services. Most of Alexicon's client companies are also contributors to the USF fund.³ Furthermore, all provide their consumers with an assortment of modern state-of-the-art telecommunications services, including (but not limited to) voice, wireless, broadband and Internet access availability. These companies generate a large part of their revenues from intercarrier charges, mostly in connection with switched access and special access charges paid by interconnecting interexchange carriers. These charges are classified as either interstate (usually rates charged based upon individual tariffs or as filed by the National Exchange Carrier Association ["NECA"]), or intrastate (rates based upon various state-specific tariff(s)) in nature.

It is through the use of the high-cost USF funds that these ILECs, and many similarly situated ILECs, have been able to provide their customers (in rural and often insular locales) with modern telecommunications services comparable to urban areas at rates lower than they otherwise would be charged without the availability of these high-cost USF funds. The ability of small ILECs to partake of high-cost USF funding is not only pursuant to the 1996 Telecommunications Act ("Act") but has also acted as a major incentive toward the financial community (local, state, federal, etc.). USF funding has provided these ILECs with the continued stability to attract

³ Consistent with Section 254 (d), 47 U.S.C. 151, with the exception of any ILEC who's contribution(s) qualifies for the *de minimus* exemption.

sufficient financial resources to maintain and improve customer services as well as their connectivity to the Public Switched Telephone Network (“PSTN”).

Alexicon notes that small ILECs receiving existing high-cost USF funds attest that these USF funds are fulfilling the 1996 Act objectives of providing “specific, predictable and sufficient federal and state mechanisms to preserve and advance universal service.”⁴ We also believe it is critical for the viability of these companies, and for maintaining comparable rural telecommunications services, to continue receiving USF fund flows in complying with this mandate. In addition, Alexicon notes that all ILECs receiving high-cost USF funding are subject to compliance with FCC Rules, in-depth review of conformity with those rules, and related review of fund distribution amounts by the National Exchange Carrier Association (“NECA”), Universal Service Administration Company (“USAC”), and other various state and federal regulatory (and auditing) authorities. This ensures that the high-cost funds are correctly being requested by and distributed to ILECs. Lastly, the fact that fund recipients are also required to annually certify that they are utilizing the high-cost USF funds “for the provision, maintenance, and upgrading of facilities and services for which the support is intended”⁵ further ensures regulators, fund contributors, and others that consumers are getting the maximum benefit(s) of the high-cost USF received by their serving ILEC (or other competitive eligible telecommunications carriers (CETC)).

COMMENTS

I. INTRODUCTION

All of Alexicon’s clients meet the definition of being a “small business within the commercial census category of Wired Telecommunications Carriers.”⁶ Because our clients are small and rural in nature, they would without exception be adversely impacted by the NOI/NPRM. In this regard, Alexicon believes the USF reform proposals set forth in the National Broadband Plan (NBP) are premature without fully investigating alternatives that will otherwise provide workable solutions for rate-of-return carriers across the nation. Further discussion and alternatives are presented in our comments below.

⁴ The Act, Section 254 (b)(5).

⁵ Section 254(e)

⁶ 13 CFR Section 121.201, North American Industry Classification System (“NAICS”) code 517110

Alexicon is surprised by an NPRM issued at the same time and in the same document as a NOI. Based on previous proceedings, the FCC and other federal agencies have generally issued an NOI to seek comments on a policy proposal. After receiving comments and reviewing them, a NPRM with specific requirements, suggestions, and sometimes further requests is then issued to expand the record and gain evidential substantiation for rulemakings. This historically successful process has not been followed in the current proceeding, leading the general public to question why the FCC is taking this approach. Moreover, based upon the issues raised in these comments, the proposal does not appear to support the “guiding principle” of the NBP which is to maximize the number of households that are served by “up to standard” service.

For all of the reasons discussed herein, Alexicon believes implementation of any current NBP proposals should be delayed pending expansion of the record and developing workable solutions that will sustain viability for rate-of-return carriers serving the highest cost areas of the country. Furthermore, Alexicon is concerned that the Commission is not utilizing its relationship with the Joint Board in accordance with Section 410(c) of the Communications Act of 1934. In this Act, Section 410(c) states,

The Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and, except as provided in section 409 of this Act, may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board. The Joint Board shall possess the same jurisdiction, power, duties, and obligations as a joint board established under subsection (a) of this section, and shall prepare a recommended decision for prompt review and action by the Commission.

Alexicon questions whether the Commission has followed due process in the current proceeding on this point or in cooperating with Joint Boards or State Commissions as stated in Section 410(a), (b), or (c) of the Communications Act of 1934. Also, as the Commission is proposing to assume broadband in their jurisdiction, additional questions arise as to what jurisdiction broadband services relate to and whether the Commission conferred with the Joint Board on “the jurisdictional separation of common carrier property and expenses between interstate and

intrastate operations...”⁷ In any case, the NPRM appears to be both legally insufficient and in violation of the Act, thereby soliciting the involvement of Congress to ensure that the principles of Section 254 of the Act are kept intact by virtue of previous proper recognition that these small carriers indeed have unique circumstances and are high-cost in nature.

II. THE ASSUMPTIONS UPON WHICH THE NOI/NPRM IS BASED ARE TOO SPECULATIVE OR SIMPLY MISTAKEN

The stated problem and basis of the NOI/NPRM is that the USF has grown too fast and the NPRM “seeks comment on specific common-sense reforms to cap growth and cut inefficient funding in the legacy high-cost support mechanisms...”⁸ This assumption is arbitrary and capricious. The following questions unavoidably arise: When does something, e.g., a fund, grow too fast? In relation to what? On what basis has the Commission determined the USF has grown too fast? It is well documented that the Jt. Board recognizes the explosive growth in USF funding is a result of CETCs and not rate-of-return carrier ILECs.⁹ In addition, the Commission, in their own words, states, “As recommended by the Federal-State Joint Board on Universal Service (Joint Board), we adopt an interim, emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers (ETCs) may receive.”¹⁰ The Commission goes on to state, “We adopt, with limited modifications, the Joint Board’s recommendation for an emergency, interim cap on high-cost support for competitive ETCs. This action is necessary to halt the rapid growth of high-cost support that threatens the sustainability of the universal service fund.”¹¹

Perhaps a more accurate view can be found in the growth of the ‘rate’ of the fund (i.e. the contribution factor assessed on carriers’ interstate revenue). In the third quarter of 2003, the assessment on carriers’ interstate revenues was 9.1%.¹² In the second quarter of 2010 that had

⁷ Communications Act of 1934, Section 410(c)

⁸ NOI/NPRM para 2

⁹ WT Docket No. 07-128, “Applications of Alltel Corporation, Transferor, and Atlantis Holdings LLC, Transferee, paragraph 8

¹⁰ WC Docket No. 05-337, CC Docket No. 96-45, “High Cost Universal Service Support, Federal-State Joint Board on Universal Service”, FCC 08-122, para 1

¹¹ Ibid, para 5

¹² Proposed Third Quarter 2003 Universal Service Contribution Factor, June 6, 2003, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-03-1909A1.pdf

grown to 15.3%.¹³ Revenues subject to the factor during the second quarter of 2003 were estimated at \$18.8B. In the second quarter of 2010, revenues subject to the contribution had decreased to \$16.6B. In 1998, the costs of the IXC's use of the local network shifted from implicit support via access charges to explicit support via LSS (Local Switching Support)¹⁴ and ICLS (Interstate Common Line Support¹⁵). While this had the desired effect of lowering long distance prices, it shifted the burden to the end user customer via increased subscriber line charges ("SLC" charges) and the USF resulting from the new LSS and ICLS. The reduction in prices (revenues) also caused an upward pressure in the percentage of revenues required to support USF.

The growth in the assessment is also a direct result of the Commission adopting the determination of the Federal-State Joint Board on Universal Service that High-Speed Access should not be eligible for USF in 2002.¹⁶ In accordance with the NBP and the Commission's proposals contained therein, should this determination be reversed and High-Speed Access added to Section 254 eligible services, this would have the effect of more than doubling the revenue assessed in the USF factoring model and therefore halving the rate.

Because Competitive ETC is one of the major factors that has historically caused an increase in the USF, Alexicon supports the recommendation to eliminate competitive ETC high-cost support. The National Broadband Plan recommends that the Commission phase out remaining competitive ETC funding under the existing funding mechanisms over a five-year period and target the savings toward the deployment of broadband-capable networks and other reforms in the plan.¹⁷ Alexicon agrees that competitive ETC support per line is based on the incumbent

¹³ Proposed Second Quarter 2010 Universal Service Contribution Factor, March 12, 2010
http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-427A1.pdf

¹⁴ *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382 (2001); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516 (2006); *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 24 FCC Rcd 6162 (2009)

¹⁵ *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, *Federal-State Joint Board on Universal Service*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, 16 FCC Rcd 19613 (2001) (*MAG Order*).

¹⁶ CC Docket No. 96-45, FCC 02J-1

¹⁷ NOI/NPRM at para 60

telephone company's support per line,¹⁸ and that, as a consequence, the support a competitive ETC receives is not based on either its costs or the costs of the most efficient technology to support customers in a given area.

Rural carriers are not the sole or even the major cause of the growth of USF. Alexicon agrees that there may be additional efficiencies to be had in providing rural telecommunication service. However, alleged "inefficiency" by rural carriers, even if it were true, could not be the major contributor to the growth of the USF, much less the sole cause. There have been many changes causing increased USF since the Telecom Act of 1996, none of which were caused by rate of return rural carriers. It is Alexicon's belief that the real problem lies in getting price cap carriers to deploy broadband. As written, the proposed solution in the NBP is to assume a "one size fits all" position and take funding away from rate of return ILECs to help move the FCC's broadband agenda along. If the Commission believes the current system needs reformed, a Rural Task Force should be established, similar to the one back in the early 2000's, to accomplish this goal. The Joint Board in past years acknowledged that this approach was the most effective and that the FCC should deal with price cap carriers separately from rate of return carriers.

The commission should take administrative notice¹⁹ that areas with the highest vacancy rate of broadband services today are price cap territories. Alexicon posits the reason is because there is no accountability for RBOCs to deploy broadband in their rural areas. As well, the USF system under a proxy cost methodology has failed miserably. When the USF was frozen in 1998 for price cap carriers and the hybrid proxy model was fashioned to develop USF, it created a disincentive for RBOCs to invest in rural areas. With no accountability to show how RBOCs have used these monies, it can only be presumed that their most rural areas did not benefit from USF by virtue of the fact that, according to the FCC's September 29th, 2009 meeting, "The smallest rural ILECs are upgrading their plant to bring broadband to rural consumers...And receive more high-cost support than AT&T, Verizon and Qwest...Even though most non-

¹⁸ 47 C.F.R. § 54.307.

¹⁹This is the administrative agency equivalent of "judicial notice" in courts, which means that a tribunal needs no evidence for facts that are generally known or in the tribunal's records; the tribunal merely "takes notice" of the fact. *Heckler v. Campbell*, 461 U.S. 458; 103 S. Ct. 1952; 76 L. Ed. 2d 66 (1983)

upgraded access lines are owned by those three companies.”²⁰ Moreover, §54.305 “Sale or transfer of exchanges” created and continues to create additional disincentive for carriers to invest in unserved or underserved rural markets as acquiring companies would have little incentive to serve areas where cost recovery is limited and insufficient. In our opinion, the Commission’s Hybrid Cost Proxy Model (HCPM) approach to USF reform has failed miserably whereas the USF high cost support mechanism utilized by rural ILECs “has achieved considerable success.”²¹ Rural America is quickly gaining traction for broadband with speeds at a much higher rate than 4Mbps today, let alone 10 years from now. In Alexicon’s opinion, the Commission is looking backwards to solve a futuristic problem: instead of shutting down a successful program under the current high cost support mechanism methodology and implementing conversion to a failed cost proxy model-based USF, the Commission should be promoting the current high cost support mechanism method for areas served by rate of return carriers. Rate of return regulation, including the high cost support mechanism utilized therein, has been tried; tested; reviewed; scrutinized; and has provided stability for over 20 years, without leading to substantial increases in the USF fund. Increases to USF are due to other factors, as discussed and exemplified in these comments.

The assumption that, without any analysis, the legacy USF cannot work for universalizing broadband is contrary to reality. The proposal states that legacy USF has been a considerable success by ensuring affordable voice service and then states that it was not designed to universalize broadband. While the current system may not have been designed for universalizing broadband, the fact is that the current high cost algorithm and other support mechanisms can very likely be modified to accommodate any new broadband USF as proposed by the NBP. The current model is indeed working.²² Alexicon’s clients are providing or working to provide broadband and IP-enabled access to their customers.²³ It should also be noted that voice and broadband are not separate networks: the same fiber, copper, and last mile facility that provide voice also provides broadband.

²⁰ September Commission Meeting, Sept. 29th, 2009, page/slide 47

²¹ NOI/NPRM, para 3

²² Federal-State Joint Board on Universal Service Recommended Decision (FCC 07J-4) Sec III.3.b paragraph 30.

²³ See discussion in “General” above.

Some provisions in the proposal (e.g., Paragraph 53) seem to assume that the USF for rural carriers is not and has not been used for broadband delivery when in fact that is entirely incorrect.²⁴ Rural ILECs have undertaken mass amounts of debt and many are still in the process of deploying fiber to the home (FTTH). There is currently no other reason for a carrier to deploy FTTH and replace copper plant than to provide broadband-related services. The Proposal attempts to take a high profile but critical resource, USF, that rate of return carriers must have in order to operate and remain viable and redistribute these monies to those carriers having unserved and underserved areas within their serving franchise. As noted above in these comments, the majority of broadband-deficient unserved and underserved areas reside in price cap territories, not rate of return territory (see footnote 20). One crucial point needs to be gleaned from this: rate of return carriers as a whole would not be able to have over 90% broadband availability in their areas (as they currently do) if it weren't for universal service funding that helps subsidize packet switching technology; last mile facility; transmission facility capable of carrying both broadband and non-broadband traffic; and certain distribution plant. In the end, transitioning companies away from rate of return regulation and away from the current high cost USF mechanisms would penalize those companies who have already deployed FTTH; deployed modernized switching technology; upgraded transmission facilities; and incurred significant amounts of debt to date in upgrading their networks and infrastructure.

Similarly, the proposal assumptions also disregard the fact that high cost support will go down for these carriers over time as networks are upgraded. This is the entire premise behind rate of return-based settlements. After a carrier deploys FTTH and other USF-subsidized plant, maintenance and future build costs will decline over time, resulting in lessened reliance on USF funding. The current mechanism works in such a way to accommodate this very idea and keep rate of return carriers financially viable so they can remain in business, thus stimulating jobs and their local economy, in direct conjunction with the ARRA and NBP. Likewise, the same business models that involve broadband in other regulatory schemes can be (and already are) applied to rate of return regulation without destroying the current successful process.

²⁴ E.g., Footnote 22 above

Contrary to the assumption in the NOI²⁵, USF is *not* federal government money

As the Commission is proposing to relieve pressure from the current USF, there are many options to do so (several of which are brought up in these comments). Making the fund grow more slowly; giving it an alternate identity; or redistributing USF monies cannot save any “government” money nor can it lower taxes.

Contrary to the assumption in the NOI, there is no reason to believe that changing the USF to the CAF would change the amount of funding needed for rural areas

Adding new, more expensive services²⁶ (while perhaps incrementally ‘less’ expensive than starting over) still results in additional cost. The NOI/NPRM indicates there would no longer be a ‘local’ element as broadband access is classified as an information service²⁷ and IP as ‘interstate in nature,’²⁸ thus placing yet more pressure on the USF. Merely moving the location of the funding source does not reduce it.

There is no empirical or theoretical basis for the assumption that rate-of-return is either non-uniform or inequitable

Paragraph 17 of the NOI/NPRM avers that a federal model could provide a more uniform and equitable basis for determining support than individual carrier cost studies, thus assuming that a process of determining support on a case-by-case basis is neither uniform or equitable. If the circumstances, as here, do not lend themselves to a uniform solution, then it is neither fair nor reasonable to try to impose a one-size-fits-all answer. The term “uniform” is not the equivalent of “equitable” and the term “equitable” actually means “fair”. Ultimately this terminology depends upon the facts of the situation and should not be generalized. Neither “uniform” nor “equal” is necessarily equivalent to fair or equitable. A very mundane illustration of this truism involves buying shoes for your children. To be uniform, you would have to buy all of your

²⁵ NPRM, para 51, “...where no firm can operate profitably without government support...”

²⁶ Exhibit 3-V, OBI Technical Paper No. 1, p. 50

²⁷ Wireline Broadband Internet Access Order, (FCC 05-150) at Paragraph 10

²⁸ Intercarrier Compensation Order(FCC 99-38) at Paragraph 23, Order On Remand (FCC 01-131) at Paragraph 58

children the same size shoes. Such a solution would be both inequitable and unreasonable because each of your children's shoe size is different. The same reasoning applies here.

There is no basis in the NOI or in reality for the underlying assumption that the stated problem requires radical measures rather than meticulous analysis and then careful change if necessary

The NOI/NPRM proposes a drastic overhaul of the system that provides telecommunications services in rural communities. Yet, there are other solutions to universalizing broadband and getting broadband deployed to unserved areas without harming small and rural ILECs. Some of those solutions and options to consider are contained in these comments. Some are contained in the comments of others in this proceeding.

It is simply untrue that a substantial cause of the unsustainable growth of the USF is the assumed serious inefficiencies of rural carriers

The major cause of the growth rate of the USF is the addition of new uses for the fund as this Commission has recognized previously and proposes to cure in the current NPRM (NPRM at 60, *Elimination of Competitive ETC High-Cost Support*). The high cost portion of the fund attributable to rate of return carriers has been roughly the same for the five years since 2005 (\$2.365B then vs. \$2.395B today), including the safety valve and safety net additive components.²⁹

The “proxy models” suggested in the NOI/NPRM are based upon unproved assumptions and unproved theories while there is an accurate and verifiable model currently in place for rate of return carriers

The result of any given proxy model is only as good as the assumptions and theories upon which the model is based. For example, the NOI/NPRM recognizes in ¶ 7 that a “model to estimate forward looking costs is a dynamic process that will need to be reviewed and adjusted periodically.” The NOI/NPRM similarly recognizes that “the model must evolve as technology

²⁹ NECA report DOC-295442A5

and other conditions change.” Most damaging of all, the Commission also admits in ¶ 7 that “the model used to determine non-rural support was adopted more than a decade ago, [and] has not been comprehensively updated” and “Not only are the model inputs out-of-date, but the technology assumed by the model no longer reflects “the least cost, most-efficient, and reasonable technology for providing the supported services that is currently being deployed.”” Given that the Commission recognizes the out-of-date nature of the current model, and also states in the NBP that, “When the FCC created IAS in 2000, it said it would revisit this funding mechanism in five years to ensure that such funding is sufficient, yet not excessive. That re-examination never occurred”³⁰, we have no plausible reason to believe that the Commission will update any model in a timely manner or could even do so. In a summary called “Computer Modeling of the Local Telephone Network”, the Commission notes, “After receiving the recommendations of a Federal-State Joint Board, the Commission adopted a Universal Service Order in May 1997. In the Universal Service Order, the Commission adopted a forward-looking economic cost methodology to calculate support for non-rural carriers. Under this methodology, a forward-looking economic cost mechanism would be used to estimate non-rural carriers' forward- looking economic cost of providing services in high-cost areas.”³¹ In that same document, it is noted “In May 1999, the Commission released the Inputs Further Notice in which it proposed and sought comment on a complete set of input values for use in the model, such as the cost of switches, cables, and other network components. In October 1999 the Commission adopted a final inputs order which adopted a set of inputs for the model along with minor modifications to the platform. In a separate order an explicit methodology for determining non-rural carriers' support to begin on January 1, 2000 was adopted.” There are several things that can be learned from the above statements: 1) The Commission referred to the Joint Board and only after receiving a recommendation from the Joint Board did the Commission move forward (which appears to not be the case in the current proceeding); 2) In May 1997, the Commission adopted a Universal Service Order, which was a direct result of action taken from the Telecom Act of 1996. However, the current HCPM was not adopted until the year 2000, almost three years after the adoption. In this respect what motivation does the general public have to believe

³⁰ NBP at pg. 147

³¹ http://www.google.com/search?hl=en&q=hybrid+cost+proxy+model&cts=1278775191416&aq=f&aqi=&aql=&oq=&gs_rfai=&gs_upl=3943%2C335%2C20%2C6%2C60%2C147%2C12%2C8; published by C.A. Bush, D.M. Kennet, J. Prisbrey and W.W. Sharkey, FCC and Vaikunth Gupta, Panum Telecom LLC, October 1999

that an updated model (with completely new assumptions, network design, engineering, technology, fixed characteristics, cost components, input values, etc.) can be completed in the extremely aggressive timeframe that the Commission is proposing in the NBP?; 3) the Commission not only sought comment for the model, but also requested additional comment to ascertain the model was as up-to-date as possible and not prepared in haste or because of an aggressive agenda; and 4) the Commission ultimately decided that a forward-looking proxy model did not work for small carriers and that this type of model would be applied only to non-rural carriers (which has been reiterated and proven numerous times in previous proceedings and agreed upon by both the Joint Board and Commission). Lastly, as shown below under “Recommendations”, Alexicon believes a simpler, time-tested, approved methodology that can be modified to accommodate the Commission’s intent of the NBP can be achieved.

Consistent with the principle that eligibility for obtaining CAF support should be technology-agnostic, Paragraph 25 seeks comment on: (1) whether the Commission should develop a model that estimates the costs of all technologies currently being deployed (or soon to be deployed) that are capable of providing voice service and broadband service that meets the national broadband availability target; and (2) on how to ensure that any cost model used in conjunction with determining CAF support is capable of identifying the least-cost, most-efficient technology in unserved areas. A forward-looking economic cost model that estimates the costs of various technologies would enable the Commission to identify the least-cost, most-efficient technology currently being deployed, and thereby, provide only as much support as needed to achieve the Commission’s goals for universal access. These questions and statements seem to favor wireless over fiber.³² Alexicon would like to interject the following thoughts: the Telecom Act of 1996 says nothing about “least-cost” as stated in the current NOI/NPRM.³³ In addition, the current NOI/NPRM says nothing about “quality”. However, Section 254(b)(1) of the Telecom Act of 1996 is crystal clear that “Quality services should be available at just, reasonable, and affordable rates.” In addition, Section 254(b)(3) states, “Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to

³² See e.g., paragraph 30 which states: Is the National Broadband Plan approach an appropriate way to model wireless deployment costs for purposes of determining CAF support?

³³ NOI/NPRM para 25

telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.” It is our belief that the Commission again may be trying to push their agenda through expeditiously to accommodate wireless providers without considering not only the mandates of Section 254(b)(1) but also the mandates of Section 254(b)(3). As stated above in these comments, many rate of return carriers are currently offering broadband speeds well above 4 Mbps actual download speeds as targeted “over the next decade” in the NBP.³⁴ In addition, the Commission recommends creating a “Mobility Fund.” Alexicon is perplexed why the Commission is proposing to “provide one-time support for deployment of 3G networks to bring all states to a minimum level of 3G or better mobile service availability”³⁵ when currently 4G networks are already being deployed. Furthermore, the Commission states in paragraph 25 of the current NOI/NBP that “We seek comment on how to ensure that any cost model used in conjunction with determining CAF support is capable of identifying the least-cost, most efficient technology in unserved areas.” Yet, the Commission states in the NBP that, “But how much this [3G/4G footprint] will ultimately cost, and exactly which parts of the country it will cover, remains unclear.”³⁶ It certainly appears that the Commission favors wireless providers with the “hope” that these providers will be able to provide a “least-cost” alternative, however in the NBP the Commission concedes it doesn’t know how much it will cost (indicating that the cost of providing service could in fact be more than that of wireline rate of return carriers for unserved and underserved areas).

To the point of quality service: once deployed, fiber will last 30 or more years and, due to its advanced technology, its cost to maintain is lower than copper plant. With the nearly limitless future capacity of fiber optic cable, it is the best long-term investment to meet the Act’s “quality service” mandate outlined in Section 254(b)(1). In comments written by the CDMA development group, the group states, “Without the freedom to control the shared spectrum resource, operators will not be able to provide the quality of service that customers expect.”³⁷

³⁴ NBP, pg XIII

³⁵ NBP, pg 146

³⁶ Ibid

³⁷ Comments dated January 14, 2010 in GN Docket No. 09-191 and WC Docket No. 07-52, pg 9

The group goes on to state, “To ensure high-quality network performance, wireless providers employ a range of measures to track the constantly changing and complex traffic and power management issues. These measures seek to deal with the distinct nature of a wireless network, which must function in a dynamic manner to address unique spectrum-based bandwidth constraints with the additional challenge of serving a diverse range of devices that support a range of functions. This is more challenging in a wireless environment given that voice and data services must share the same bandwidth...”³⁸ In those comments, Verizon, for example, recognizes the difficulties and limitations inherent in a wireless network: “In a presentation made by Verizon, the company noted that wireless broadband is more complex than wireline in the engineering and management of the network... There are substantial issues with regards to radio signals fading, interference, mobility management and traffic patterns... The presentation noted further the challenges that arise given that air interface bandwidth is constrained due to the fact that spectrum is a limited resource and there is only a fraction of bandwidth available as compared with a wireline environment...” Lastly, this group specifically recognizes that “up to” and “actual” upload/download speeds are drastically different in an IP/broadband environment: “EV-DO Rev. A, widely deployed in the U.S. and worldwide, is an IP-based low latency, packet data only solution, with downlink (DL) peak data rates of 3.1 Mbps, and average throughputs of 600-1400 kbps; and uplink (UL) peak data rates up to 1.8 Mbps, and average throughputs of 500-800 kbps, in 1.25 MHz carrier.”³⁹ While Alexicon understands the necessity of wireless networks and the many conveniences they inherently have, we simply want the record to reflect that, in their own words, “wireless networks are more complex than wireline”; “There are substantial issues with regards to radio signals fading, interference, mobility management and traffic patterns..”; and “there is only a fraction of bandwidth available as compared with a wireline environment..”. Given the above, Alexicon questions whether all of the components (i.e. spectrum; bandwidth capacity; engineering; management; interference; radio signals fading; etc.) necessary to deploy a *quality* broadband wireless network will indeed be “least-cost” as implied in the NOI/NPRM? Several other assumptions and questions can be gleaned from CDMA’s comments:

- Quality of service in wireless networks is questionable if the optimum circumstances are not met or adhered to. We believe this could be a direct violation of Section 254(b)(1)

³⁸ Ibid, pg 11

³⁹ Ibid, pg 5, footnote 7

- Bandwidth constraints plague the wireless industry, questioning whether this industry as a whole will be not only ready but also able to transition to a broadband-centric USF plan
- Alexicon believes the following comments submitted by CDMA are blatantly incorrect: “This is more challenging in a wireless environment given that voice and data services must share the same bandwidth...”. Wireline networks not only accommodate voice and data services while sharing the same bandwidth but also accommodate video services as well as other extremely high-speed applications (DS3; GIG E; OCxx; etc). In this respect, Alexicon emphatically notes that wireless networks are no different than wireline networks as it relates to voice and data sharing the same bandwidth.

Alexicon does concede that the current cost of bandwidth, including middle mile transport, makes providing ubiquitous broadband very expensive in rural America. This issue alone deserves a significant amount of attention, analysis, and planning to incorporate into a carefully-crafted CAF or broadband USF mechanism.

The assumption that incentive regulation/price cap and reverse auction will work to relieve pressure from the current USF is unsupported in light of the commission’s estimate in ¶ 46 of the NOI that 54% of the service areas will still need subsidies

As cited by the Commission in ¶ 11, the National Broadband Plan concludes that private investment alone is unlikely to extend broadband in some areas of the country with low population density. In particular, “[b]ecause service providers in these areas cannot earn enough revenue to cover the costs of deploying and operating broadband networks, including expected returns on capital, there is no business case to offer broadband services in these areas.” The proposed “Connect America Fund” (CAF) and the intent contained therein is in actuality no different from the current USF as it relates to funding necessary to carry out the purposes of the NBP and Telecom Act. Similarly, there is no factual evidence in past proceedings, the NBP, or from the “71 economists” that the financial needs⁴⁰ under the new fund will not grow as quickly (or more so) as the current USF did, even under the Commission’s most optimistic forecast. Also, there is currently no discussion on who will pay into the new fund and how ultimately the new fund will save money. Instead, there is currently only speculation to this end. As we’ve shown in these comments, the current proven cost-based model for rate of return carriers is

⁴⁰ To comply with the “sufficient” mandate as contained in Section 254(b)(5) and Section 254(e) of the Act

working and provides stability for rate of return carriers (who currently serve approximately only 5% of the nation's access lines⁴¹).

Paragraph 23 seeks comment on whether the Commission should base any new CAF support on the forward-looking economic costs of an efficient provider rather than embedded costs. It goes on to state that basing support on forward-looking costs is consistent with the Commissions' policy. Alexicon finds it odd that "the Commission's policy" in the current NOI/NPRM is not consistent with the Commission's policy in previous dockets⁴² and their policy in the current docket is also in direct conflict with the conclusion that the Joint Board and Rural Task Force came to in the past dockets.⁴³

The NOI/NPRM strays from the recommendations of the NBP particularly with regard to the USF but also to rural service areas and customers in general

The general goal recommended by the NBP is that the FCC should conduct a comprehensive reform of universal service and intercarrier compensation in three stages to close the broadband availability gap.⁴⁴ To accomplish this goal the NBP suggests three carefully designed stages with time lines:

Stage One constitutes laying the foundation for reform and is recommending to occur from 2010 to 2011. The steps in Stage One are that the FCC should:

- Improve Universal Service Fund (USF) performance and accountability
- Create the Connect America Fund (CAF)
- Create the Mobility Fund
- Design new USF funds in a tax-efficient manner to minimize the size of the gap
- Solicit input from Tribal governments on USF matters that impact Tribal lands throughout the USF reform process
- Take action to shift up to \$15.5 billion over the next decade from the current High-Cost program to broadband through common-sense reforms

⁴¹ Federal State Joint Board Monitoring Report, Table 7.9. pg 7-17, Released 12/09

⁴² i.e. CC Docket No. 92-135

⁴³ FCC 07J-4 sec III D paragraph 39: "the Joint Board believes it is in the public interest to maintain, for the present, the existing RLEC support mechanisms."

⁴⁴ The following discussion is based upon the NBP pp. 135-151

- Adopt a framework for long-term intercarrier compensation (ICC) reform that creates a glide path to eliminate per-minute charges while providing carriers an opportunity for adequate cost recovery, and establish interim solutions to address arbitrage
- Examine middle-mile costs and pricing

As can be seen, the first 2 years consist of studying and planning. It specifically does not include requesting feedback to enhance the record in this proceeding or any other definitive action before these steps are taken. Alexicon believes it is critical to plan, analyze, and gather evidence in this proceeding in an effort to not rush this most important transition and give the NBP its due credit. NOIs would be useful to obtain input. Only after each step is completed would an NPRM be appropriate.

Stage Two constitutes accelerating reform and is recommend to occur from 2012 to 2016. The steps in this stage are that the FCC should:

- Begin making disbursements from the CAF
- Broaden the universal service contribution base
- Begin a staged transition of reducing per minute rates for intercarrier compensation

Again, it can be seen that the steps to the ultimate goal should be taken carefully. Planning and then incremental implementation are the core of these stages. The NOI/NPRM does not follow this strategy and that failure underlies most of the comments herein.

Stage Three constitutes completing the transition from 2017 to 2020. The steps in this stage are that the FCC should:

- Manage the total size of the USF to remain close to its current size (in 2010 dollars) in order to minimize the burden of increasing universal service contributions on consumers
- Eliminate the legacy High-Cost program, with all federal government funding to support broadband availability provided through the CAF
- Continue reducing ICC rates by phasing out per-minute rates for the origination and termination of telecommunications traffic

This stage continues the measured steps and consideration for any harm that might come from the actions taken to reach the desired goal. That is lacking in the current NOI/NPRM.

In order to accelerate broadband deployment the NBP recommends Congress should consider providing optional public funding to the Connect America Fund, such as a few billion dollars per

year over a two to three year period.⁴⁵ The NBP further recommends Congress should consider providing other grants, loans and loan guarantees such as expanding combination grant/loan programs; expanding the Community Connect program; and establishing a Tribal Broadband Fund to support sustainable broadband deployment and adoption on Tribal lands.

When the NBP specifically addresses the broadband availability gap,⁴⁶ it addresses relevant issues not addressed or adequately addressed in the NOI/NPRM. For example, the NBP recognizes that the availability gap is greatest in areas with low population density⁴⁷, and states:

Because service providers in these areas cannot earn enough revenue to cover the costs of deploying and operating broadband networks, including expected returns on capital, there is no business case to offer broadband services in these areas. As a result, it is unlikely that private investment alone will fill the broadband availability gap. The question, then, is how much public support will be required to fill the gap.

An FCC analysis finds that the level of additional funding required is approximately \$24 billion (present value in 2010 dollars)⁴⁸ as described in Exhibit 8-B.⁴⁹ Exhibit 8-B presents the broadband availability gap in greater detail. Initial capital expenditures (“initial capex”) are the incremental investments required to deploy networks that can deliver the targeted level of service to everyone in the United States; this covers new networks and upgrades of existing networks. “Ongoing costs” are the incremental costs that must be incurred to operate those networks. They include the cost of replacing old or outdated equipment, access to middle-mile transport and other continuing costs such as customer service, marketing and network operations.

The NOI/NPRM does not adequately address these issues and therefore contains assumptions and conclusions that are not or may not be supportable.

It should be noted that Alexicon does not oppose, and actually supports, the proposal in paragraph 60 recommending the elimination of Competitive ETC High-Cost Support as it works under the current USF system. The National Broadband Plan recommends that the Commission

⁴⁵ NBP, pg 151

⁴⁶ Id. at pp. 136 et seq.

⁴⁷ Id. citing Robert C. Atkinson & Ivy E. Schultz, Columbia Inst. for Tele-Information, *Broadband In America: Where It Is And Where It Is Going (According To Broadband Service Providers)* 24 (2009) (Atkinson & Schultz, *Broadband in America*).

⁴⁸ Id. stating: According to Clearwire’s November 10, 2009 earnings report, it expected to provide service in the following cities by the end of 2009: Atlanta, GA; Baltimore, MD; Boise, ID; Chicago, IL; Las Vegas, NV; Philadelphia, PA; Charlotte, Raleigh, and Greensboro, NC; Honolulu and Maui, HI; Seattle and Bellingham, WA; Portland and Salem, OR; and Dallas/Ft. Worth, San Antonio, Austin, Abilene, Amarillo, Corpus Christi, Killeen/Temple, Lubbock, Midland/Odessa, Waco and Wichita Falls, TX. Clearwire, *Clearwire Reports Third Quarter 2009 Results* (press release), Nov. 10, 2009, <http://investors.clearwire.com/phoenix.zhtml?c=198722&p=irolnewsArticle&ID=1353840>.

⁴⁹ Exhibit 8-B is omitted

phase out remaining competitive ETC funding under the existing funding mechanisms over a five-year period and target the savings toward the deployment of broadband-capable networks and other reforms in the plan.⁵⁰ Alexicon agrees that the support a competitive ETC receives is not based on either its own costs or the costs of the most efficient technology to support customers in a given area.

“You need us and here’s why”

What is most perplexing is the failure to recognize the necessity for wireline infrastructure equally distributed throughout the country. Too often we hear about “wireline versus wireless”, and the amount of misinformation being promulgated across the Internet and throughout the various news sources is staggering. If the United States is to remain the world leader in providing the most modernized telecommunications and broadband networks, the discussion inevitably will return to the best long-term quality solution, which as we have stated in these comments is fiber.

Too often the discussion becomes clouded by associating wireline with voice only services. Since its invention by Alexander Graham Bell in 1876, the landline telephone has been synonymous with voice service, yet wireline has been the predominant superhighway for data/Internet services for years. In an incredibly irresponsible lapse in judgment, one of the largest mobile wireless providers recently created and aired a television commercial depicting a young woman cutting down a utility pole with the message that it was time to "cut the cord". Sadly, if wireline providers had taken them up on the offer, and "cut the cord" to every wireless cell site or base transceiver station, nearly every mobile wireless customer would have lost service across the country.

Technology continues to evolve with incredible strides that have allowed the country's investment in legacy copper plant to be utilized for providing broadband services. Deploying speeds up to 300 Mbps⁵¹, Ethernet over copper allows for a sensible migration to fiber in every home and business while transitioning to the arguably limitless capabilities of fiber optic cable and leveraging the imbedded capital investments. Simple corrections to outdated interconnection

⁵⁰ National Broadband Plan at 147-148

⁵¹ Alcatel-Lucent Boosts Broadband Over Copper to 300M Bps Mikael Ricknäs, IDG News Service Apr 21, 2010

requirements amongst carriers of all shapes and sizes; acknowledgement of prohibitive bandwidth cost limitations; and changes in rules that will allow for the recovery of costs associated with "middle mile" connections for not only voice but data as well will go a long way in fixing the current data bottlenecks.

III. THE NOI/NPRM FAILS TO ADDRESS ESSENTIAL ISSUES, SOMETIMES IN DIRECT VIOLATION OF LAW

The proposal in the NOI/NPRM fails to meet the requirement of the 1996 Act⁵² to provide comparable service to rural areas

In the Telecommunications Act of 1996 (1996 Act), Congress directed the Commission and States to take the steps necessary to establish support mechanisms to ensure the delivery of affordable telecommunications service to all Americans, including low-income consumers, eligible schools and libraries, and rural health care providers. Specifically, Congress directed the Commission and the States to devise methods to ensure that: Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas ... have access to telecommunications and information services... at rates that are reasonably comparable to rates charged for similar services in urban areas.⁵³ The Commission acknowledged this requirement, for example, in 1997.⁵⁴ Therefore any proposal from the FCC must maintain rates for basic residential service at affordable levels. The current NPRM does not provide any indication that it will do that for basic voice service, let alone the vaguely defined additional broadband service. Similarly, any proposal from the FCC must ensure that affordable basic service continues to be available to all users through an explicit universal service funding mechanism.

⁵² Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amends the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (Act). Hereinafter, all citations to the Act and to the 1996 Act will be to the relevant section of the United States Code unless otherwise noted

⁵³ 247 U.S.C. § 254(b)(3).

⁵⁴ In the Matter of Federal-State Joint Board on Universal Service CC Docket No. 96-45 REPORT AND ORDER Adopted: May 7, 1997 Released: May 8, 1997

In violation of the Act, there is no mention of affordability of rates

One reason affordability may not have been addressed in the NOI/NPRM may be that the proposal, if adopted, could likely raise rates. While the NOI/NPRM was developed to request feedback on the NBP and broadband delivery in general, the same basic principle for voice USF needs to apply to Broadband USF. It is not only essential but mandatory that rates in rural, insular, and high cost areas must remain affordable and comparable to urban rates. If the proposal is approved as written, it will inevitably cause substantial rate increases in rural areas resulting from the lack of sufficient funding necessary to carry out the Act's purposes. Without a support fund (by any name) based on costs, broadband and phone rates will skyrocket in rural areas. Indeed, the Commission previously created its Separations rules with this in mind: *"ILECs were then required to "phase down" their interstate allocations of these costs from pre-1981 usage-based levels to a flat, 25% "gross" allocation, causing higher percentages of costs to be allocated to the state jurisdiction. In 1984, concerned about the effects that this phase-down might have on local rates in high-cost areas, the Commission adopted rules permitting ILECs with loop costs exceeding 115% of the national average to recover a higher proportion of their costs from the interstate jurisdiction, thus reducing intrastate (local) costs. These "expense adjustment" provisions incorporated in Part 36 of the Commission's rules, formed the basis of universal service funding for high-cost companies."*⁵⁵

The NBP fails to address the digital divide by proposing a 4 Mbps service as adequate

Both the NBP and the NOI/NPRM evince a blatant disregard for the digital divide being created (100 million homes with 100 Mbps service⁵⁶) and then 4 Mbps service in rural America.⁵⁷ Those companies that have incurred the costs to deploy FTTH and related transmission equipment, and thereby have the capability to provide 100 Mbps service to their customers, are going to have their support potentially redirected to other carriers that do not or cannot provide 4 Mbps service.

⁵⁵ NECA guide to Telephone Regulation, Revised as of May 9, 2007, "Brief History" section, pg 2

⁵⁶ NBP, pg XIV

⁵⁷ 4 Meg minimum speed discussed throughout the NBP

The proposed “4 Meg down/1 Meg up” speeds do not meet the statutory requirements of 254(b)(3) as urban speeds today are moving toward 50-100 Mbps.⁵⁸ Furthermore, the proposed 4 Mbps service provides only for the path from the end-user’s premises and the service provider Internet gateway that is the shortest administrative distance from that NIU.⁵⁹ The ‘middle-mile’ transport has been recognized as a significant obstacle in providing internet access.⁶⁰ The current NOI/NPRM does not address this.

As noted above, broadband services require greater consumer expense, knowledge, and “user friendly” operational education. This NOI/NPRM does not attempt to address or request feedback on any of these, nor has any proceeding begun to examine these points. The NOI recognizes the need for ‘middle-mile’ infrastructure, but again presupposes the ‘national-model’ approach which cannot possibly address the huge variables in over 1000 individually situated rural carriers. Under the current regulatory and market structure of the Internet, there is no mechanism to recover the higher access costs for the ‘middle-mile’, as its nearest equivalent in the PSTN is transport-related ‘trunk-side’ access.

The NOI/NPRM fails to address the ‘natural monopoly’ nature of telecommunications networks

While there may coexist multiple carriers in a given service area, the lower the population density, the less likely that a given end user is close to, let alone connected to, more than one network. Moreover, in restructuring USF the existing carrier’s sunk costs must be taken into consideration. Even wireless networks have a substantial reliance on the wireline network for cell site connectivity and backhaul. The largest differentiators in circuit switched-only networks versus IP-based networks is 1) the switching infrastructure, which has a limited lifespan and will naturally depreciate out of the network over time; and 2) interconnection circuits, which require much larger capacities than traditional TDM voice networks. For this failure alone, the NPRM cannot stand.

⁵⁸ Comcast 50Mbps announcement – June 2009, Suddenlink 107Mbps – Mar 2010)

⁵⁹ National Broadband Plan, Chapter 8, footnote 2.

⁶⁰ OBI Technical Paper, Chapter 4 conclusions p. 122

There is no consideration for underserved areas

Underserved areas are not a serious problem in rate of return carrier areas whereas this topic is an important problem within the rural service areas of larger urban service providers. This issue is also very complex⁶¹ and thus needs to be addressed thoroughly in this proposal or any similar proposal.

The current NOI/NPRM does not discuss, nor even reference, Lifeline/LinkUp programs

It is a requirement of federal law that there is a network available for Lifeline/Link-Up programs to work. As regulatory pressures on ‘efficient’ operations can and have created pockets of poor service (Qwest II), the current NPRM would only exacerbate this. In addition, Internet Protocol service is inherently more expensive at the customer end, requiring greater consumer investment and education. Congress recognized this when they allocated \$250,000,000 ‘to encourage sustainable adoption of broadband service’.⁶² While VoIP service itself can be less expensive than baseline voice service, to realize the savings the consumer must first have Broadband Internet Service at additional cost.⁶³

There must be a transition framework for the Lifeline and LinkUp programs. These programs provide support for the most vulnerable populations and are both voice-only and tied to Carrier of Last Resort obligations today. Without any pre-planned framework, any ‘cap and migrate’ concept in transitioning Lifeline/LinkUp to a new USF mechanism fails on its face and must be brought in tandem with any rulemaking. Similarly, if Carrier of Last Resort obligations remain (as they should), transitioning to a different service model (broadband POTS) will increase per line POTS support requirements. This must be recognized early on and be built into any transition that assumes a total migration to IP.

⁶¹ For example, the definition of “underserved” changes often. In fact, the definition of underserved changed between the first and second rounds of the ARRA BIP awards. American Recovery and Reinvestment Act (“ARRA”), Broadband Initiatives Program (“BIP”)

⁶² American Recovery and Reinvestment Act (“ARRA”), Broadband Technologies Opportunities Program (“BTOP”)

⁶³ “RATES EXCLUDE INTERNET SERVICE, SURCHARGES, FEES AND TAXES. FOR CANCELLATION AFTER THE 30-DAY MONEY BACK GUARANTEE PERIOD AND WITHIN BEFORE 1 YEAR FROM ORDER PAYMENT DATE.” Vonage disclaimer, www.vonage.com, 25 June, 2010

The proposal fails to address the possible need to amend the Act

The NOI/NPRM fails to address jurisdiction, always a fundamental issue for the FCC. In previous studies and recommendations, there has always been a component of Intrastate jurisdiction. While Congress, the federal courts and the FCC have not finalized jurisdictional authority or boundaries on several fronts, Orders to date have placed Internet Service and Internet Access entirely in the federal jurisdiction.⁶⁴

Past practice and jurisdictional decisions indicate there would no longer be a ‘local’ element if the NPRM were to be formally adopted as a rule. Eliminating local authority would place yet more pressure on the USF as many States have implemented local USF mechanisms to supplement capped Federal support. Merely moving the location of the funding source does not reduce the fund or the need for it.

The NOI/NPRM fails to address the possible consequences of freezing the USF at 2008 or 2010 levels

There is no explanation why the Commission would freeze the USF before the effects of such a freeze have been studied and before all of the issues raised in and by the proposal have been addressed. This premature freeze will mean that there will be no or very little infrastructure build-out or updating of the systems in rate of return rural carriers’ areas. Certainly a soundly run business would not make such risky investments or take out loans for such projects, which would be even riskier.

For example, NTCA, OPASTCO and WTA warned in a letter to the Secretary of Agriculture dated June 14, 2010, addressing that very problem:

.... This proposal not only creates uncertainty, it jeopardizes infrastructure investment, future debt equity loans for carriers, and the repayment of Rural Utilities Service (RUS) loans.

There is grave concern about the ability of our members to pay back existing communications loans made by RUS. Some rural communications providers that have been approved for Broadband

⁶⁴ See footnotes 27 & 28 above

Initiative Program loans under the American Recovery and Reinvestment Act are now reconsidering the viability of repaying these loans in the future if the NBP is implemented in its current form.

For decades, small independent communications carriers have invested in networks in rural areas based on a relatively predictable regulatory structure, Universal Service Fund support and loans from the RUS, all of which have led to success in the deployment of voice and broadband service. As proposed, the NBP abandons this successful policy approach endangering our national statutory goal of affordable and comparable communications service for all consumers, including those living in rural and insular areas. Communications providers and policy makers need to strive for viable and robust broadband networks in rural areas while making sure that the services are affordable.

Communications providers that serve rural America have worked hard to develop access to high-speed broadband for their residential, agricultural and small business consumers. The FCC's broadband proposals contained in the National Broadband Plan are detrimental to the current and future broadband networks in rural communities.⁶⁵

The proposal fails to address the issue of what will happen to the RUS and CoBank loans⁶⁶

The disastrous effect on such loans is discussed elsewhere herein.⁶⁷ In addition to the urgency for resolution on this important and essential issue before going any further with this proposal, the item is tied into the taking issue discussed below.

The proposal fails to address the centralization of power in the federal government that will result if it is implemented

The NOI/NPRM proposes to develop a proxy model; go through procurement auctions; determine reserve prices for areas that may not receive a lot of bidders; and redistribute funds based on some national statistic or benchmark that is supposed to know which areas need

⁶⁵ While the letter responds to the National Broadband Plan (NBP), it is addressing the very same issues as contained in these comments. NTCA is National Telecommunications Cooperative Association; OPASTCO is Organization for the Promotion and Advancement of Small Telecommunications Companies, and WTA is Western Telecommunications Alliance

⁶⁶ See discussion of loans in the letter cited above

⁶⁷ Id.

broadband and which do not. The authority will all be centered in “big government” rather than under local or state control as it is now. This is not efficient and would cost more than the programs that would be eliminated. Alexicon has not had sufficient time to research thoroughly the effect of this centralization on state authority but it can be surmised from the proposal that states will lose some or all control over certain aspects of telecommunications which the states now regulate.

The proposal fails to address the need for repeal of old, or the need for promulgation of new, regulations

Title 47, Part 54 “Universal Service,” Subpart K “Interstate Common Line Support Mechanism For Rate-Of-Return Carriers” applies only to rate of return carriers. These regulations would have to be repealed, for example, but similar regulations will need to be instituted for the CAF or other subsidies needed for the 54% of the rural carriers that will still need subsidies.⁶⁸

IV. THE NOI/NPRM, WITHOUT ANY EMPIRICAL BASIS, PROPOSES MASSIVE AND SIGNIFICANT CHANGES TO A RATE OF RETURN-BASED TELECOMMUNICATIONS USE SYSTEM THAT HAS WORKED AND IS WORKING TO FULFILL THE PURPOSES FOR WHICH THE SYSTEM WAS CREATED

The assumptions about the superiority of competition and incentives in rural service areas are based on faith and on models created in universities and not on empirical data in sparsely populated rural telecommunications service areas

The ‘proxy model’ approach has numerous flaws even when applied to non-rural carriers, as indicated most recently in Qwest II, where local conditions and costs are far more relevant even for a very large carrier. The FCC and the States have recognized this. The recent Qwest II decision⁶⁹ flies in the face of the ‘one size fits all’ model concept, even as it applies to very large, primarily non-rural carriers. While arguing that the model works, the Commission nonetheless granted the relief requested.⁷⁰

⁶⁸ NOI/NPRM para 46

⁶⁹ FCC 10-56

⁷⁰ Ibid, paragraphs 3-5

Alexicon believes the ARRA grant process may provide relevant test data, but will take a minimum of 3-5 years to provide measurable results as this is the timeframe for deployment under ARRA. Alexicon also suggests there has been one relevant dataset generated primarily in non-rural markets: the CLEC industry spawned by the Act. In that “test,” many if not most participants went bankrupt.⁷¹ The rate of return regulated rural market should not be put at risk in the same fashion. The way this proposal is designed to transition legacy funding to the “least-cost, most-efficient technology in unserved areas” will bankrupt rural ILECs, leaving stranded investment and actually widening the “broadband availability gap”, which contradicts the goal of universal service and Section 254 of the Act.

Paragraph 43 of the NOI/NPRM states the Commission believes it is “critical to constrain growth in the legacy high-cost support mechanisms while we develop rules for a more efficient and accountable universal service funding mechanism.” The Commission does, however, “recognize that firms today are upgrading and modernizing their networks to offer a wide array of new services to consumers.” Then the paragraph seeks comment on whether there is an efficient method for delivering a set amount of support, which does not require the use of a model. The answer is clear: use the current rate-of-return system with improvements to accommodate broadband deployment while fulfilling the intent of the NBP.

The model approach of the NOI/NPRM has important flaws even when applied to non-rural carriers

The Qwest II Order,⁷² although involving a large carrier, is instructive because it shows that specific local conditions and costs are decisive even for a very large carrier. The FCC and the states⁷³ have recognized the importance of local circumstances on numerous occasions and the inherent flaws in a one-size-fits-all model.

⁷¹ Steven Pizzo, Farbes ASAP 10 Sept, 2001 “ Over the past four years, 225 CLECs have gone bankrupt or have been absorbed by other CLECs, or, more often, by the regional Bells themselves, according to New Paradigm Resources Group.” American Journal of Business, Spring 2003, Vol 18, No1, Cecilia Wagner Ricci, “Forty-nine percent of the CLECS filed for bankruptcy between January 2000 and September 2002” <http://www.bsu.edu/mcobwin/majb/?p=135>

⁷² Order on Remand FCC 10-38.

⁷³ E.g., *Commonwealth Edison Co. v. Ill. Prop. Tax Appeal Bd.*, 378 Ill. App. 3d 901; 882 N.E.2d 141 (Ill. App. 2008)

The FCC has recognized that a ‘one size fits all’ approach cannot work in rural America. The Rural Task Force, established by the Commission in 1998 published ‘The Rural Difference’ in January 2000. This report presents some of the extreme variables encountered in rural areas.⁷⁴ In August of that year, the RTF published their 3rd white paper ‘Alternative Mechanisms for Sizing a Universal Service Fund for Rural Telephone Companies’⁷⁵ in which they pointed out significant problems with both the model approach and the reverse auction. Nothing in the NOI/NPRM addresses the issues contained in that white paper.

It is essential to test the underlying theories and assumptions before making such extensive and potentially dangerous changes

RUS and NTIA sought comments on the distribution of ARRA grants and loans and, among others, received the 71 economists’ comment strongly urging the use of reverse auction for distribution of ARRA broadband funds. Even the 71 economists’ comments, which it must be noted, was intended for the RUS and NTIA for awarding stimulus funds and not for rate of return-based companies, acknowledged that testing the assumptions first would be a sensible idea:

This plan is intended to be a starting point from which auction design experts would proceed to build and implement a fully functional auction. Finally, we explain that even if policymakers are skeptical of procurement auctions, one could be implemented quickly as part of an initial tranche of stimulus funding in order to test its efficacy relative to traditional approaches. This approach would allow NTIA/RUS to quickly expand upon or modify the procurement auction program in subsequent funding rounds. *(Emphasis added.)*

Thus it is clear that even the 71 economists who pushed aggressively for reverse auction for ARRA funds understood that caution could be a good idea. Despite the push from the 71

⁷⁴ Archived data from the Rural Task Force, White Paper 2, The Rural Difference found at http://www.wutc.wa.gov/rtf/old/RTFPub_Backup20051020.nsf/e1b9e65978d9348b882567d2008318d3/4951d0c8d59b2d4d8825687000826423!OpenDocument

⁷⁵ Archives of the Rural Task Force. White paper 3, Alternative Mechanisms for Sizing: A Universal Service Fund for Rural Telephone Companies, found at [http://www.wutc.wa.gov/rtf/old/RTFPub_Backup20051020.nsf/43e458610b70dda882567d00074c6cd/53a531a1009c4aa48825694a0081b0fc/\\$FILE/White%20Paper%203.pdf](http://www.wutc.wa.gov/rtf/old/RTFPub_Backup20051020.nsf/43e458610b70dda882567d00074c6cd/53a531a1009c4aa48825694a0081b0fc/$FILE/White%20Paper%203.pdf)

economists, RUS and NTIA deliberately refused to adopt reverse auction for grant funding to unserved and underserved areas under the BIP and BTOP programs.⁷⁶

The commission should also take into account the fact that the awarding of stimulus funds was more like procurement (for which reverse auctions are more conducive) than is the rural telecommunications industry. Yet still reverse auction was rejected as an option for approved stimulus funding. There are other federal precedents for such testing. See, for example, the Self-Governance program for federal funding to Indian Tribes.⁷⁷ Congress began with a demonstration project for a small number of Tribes that met certain criteria; then the program was expanded to more Tribes that met the criteria; and finally the program was opened to all Tribes that met the criteria. A similar demonstration project or approach would be a more prudent method to test unsupported theories and assumptions that underlie the model(s) used by the Economists and subsequently by the Commission in its NBP proposal instead of transitioning to a mechanism that is unsupported, untested, and has no basis.

V. RATE OF RETURN WORKS

“If it ain’t broke don’t fix it”

The Commission and the Joint Board have recognized, sometimes concurrently, that ‘efficient’ regulation sometimes requires some form of model and that rural carriers face widely disparate challenges in subscriber densities, topography, and socio-economic conditions, making a single model problematic. There is simply no empirical evidence supporting ‘inefficiency’ of rate of return rural carriers. There is also no definition of “efficiency” as this term relates to rate of return carriers in sparsely populated rural areas. Alexicon is interested how the Commission, both in the NPB and NOI/NPRM, has come to the conclusion that “efficiency” and “high cost” are interrelated and whereby one term is reliant upon the other?? Even Congress recognizes in the Act that high cost areas are those generally known as rural and insular in nature. In addition, both the Joint Board and Commission recognize that the growth in the current USF system has become unsustainable resulting from [mostly] CETCs, not rate of return carriers. In this respect,

⁷⁶ See general the Broadband USA program funded by ARRA found at <http://www.broadbandusa.gov/>.

⁷⁷ 25 U.S.C. § 650e.

Alexicon again suggests the current system is working for rate of return carriers but may need modified to accommodate the deployment of broadband, of which a recommendation/option/alternative is shown further below in these comments.

The fact is that ‘efficiency’ is a euphemism for lower operating costs, which is a euphemism for reductions in the labor force. If the current proposal is approved as written, jobs important to rural communities will be lost, both directly (employees of rural telecommunications companies) and indirectly (from the businesses that formerly provided goods and services to both these telecommunications companies and employees). Moreover, a proposal that will destroy jobs is contrary to the Congressional intent of ARRA⁷⁸ and more specifically BTOP and BIP stimulus programs.

Rate of return has given consumers increasingly better services

The current increase in rural broadband adoption has surpassed the increase in the rate of urban adoption.⁷⁹ In addition, companies like Frontier⁸⁰, TDS, and others commence deals with non-rural carriers, knowing in many instances that rural areas of the non-rural provider’s service area is in desperate need of upgrading. As the Commission noted in its news bulletin when it approved the Frontier-Verizon transaction: “Frontier will significantly increase broadband deployment for the lines involved in this transaction, only 62 percent of which are broadband capable today.”⁸¹ In the Order itself, the Commission states in footnote 56: “We recognize that carriers are generally less likely to compete in rural territories because of the high costs of reaching consumers and the relatively low potential revenues from less dense areas.”⁸² This last statement made by the Commission begs the question: while even the Commission understands not only the high cost nature of rural areas but also understands that these areas are densely populated, how can the Commission make this statement in an Order that was released less than

⁷⁸ American Recovery and Reinvestment Act of 2009, Section 3(a)(1) To preserve and create jobs and promote economic recovery

⁷⁹ Horrigan, John. A, Home Broadband Adoption 2009, Pew Internet & American Life Project, June 17, 2009, found at <http://www.pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009.aspx> , accessed on June 25, 2010

⁸⁰ WC Docket No. 09-95, FCC 10-87, “Memorandum Opinion & Order, Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control

⁸¹ FCC News Bulletin released May 21, 2010

⁸² WC Docket No. 09-95, FCC 10-87

two months ago but make the exact opposite argument in their current NOI/NPRM related to rate of return regulation and rate of return carriers in general???

VI. PRICE CAP AND REVERSE AUCTIONS WILL NOT WORK AND WILL MOST CERTAINLY CAUSE HARM TO RURAL AMERICA

Incentive Regulation (a.k.a price cap regulation) is designed to promote efficiencies of operation in a regulated utility by encouraging the utility to increase its profitability through operating efficiencies but it is not suitable for the distinctive circumstances of the vast majority of rural carriers

Price cap regulation provides for ‘baskets’ of services within which carriers are able to realign prices and by providing for a productivity factor (X factor) which, if the carrier exceeds it, improves the carriers’ profitability. While this has been shown to have merit with the largest of carriers (specifically AT&T and the former Bell Operating Companies), there is by definition a lack of the scale needed to realize those efficiencies in the rural carrier business model. The largest carriers have millions of lines in urban areas, hundreds of thousands of special access lines, and tens or even hundreds of thousands of employees.⁸³ In contrast many rural carriers have only hundreds of lines, few or even no special access lines, and as little as tens of employees. There is little to no room for ‘operational’ efficiencies as minimum service levels need to be maintained.

It is surprising that the FCC, during a deep recession, would propose an untested regulatory framework that will indisputably lead to a significant loss of jobs in the heartland of the nation

As stated above, “efficiencies in operations” is a euphemism for reduction of labor since this is almost always the fastest and most efficient way to realize improvements in operating costs.⁸⁴ The NBP and this NOI/NPRM propose a single model to represent the ‘average’ company necessary to impose price cap regulation. As mentioned in the preceding paragraph, there is a tremendous disparity in scale between non-rural carriers and rural carriers, and similar disparities

⁸³ AT&T Worldwide employees: 276,280, ATT Corporate Profile website 6/15/2010, found at <http://www.att.com/gen/investor-relations?pid=5711>.

⁸⁴ Verizon to cut roughly 13,000 jobs in 2010. The company took a one-time \$3 billion charge in connection with the 17,000 jobs it eliminated last year posted 01/29/10, at 03:41 PM EST found at <http://www.forbes.com/2010/01/29/layoff-tracker-unemployment-leadership-careers-jobs.html>.

exist even within the subset of rural carriers. The proposed regulation would likely result in significant consolidation in the industry in order to realize economies of scale. Such mandatory consolidation inevitably results in loss of jobs.

In the middle of the worst recession in 70 years and while other federal agencies, Congress and the Administration are working hard to reduce unemployment and put people back to work (e.g., ARRA), it should go without saying that a federal agency should not propose a regulatory framework that will indisputably lead to a significant loss of jobs in the backbone of the nation, our rural areas. Unfortunately in this case it needs to be said, loud and clear. The Labor Department's numbers show 14,973,000 unemployed as of May, 2010.⁸⁵ The true number of people who are struggling to make ends meet without any job or are without full-time jobs is significantly larger because Labor Department statistics count only the number receiving unemployment benefits. That number does not include those who have run out of benefits, work only part-time or are underemployed.

It cannot be contested that this loss of jobs will lead to:

- Loss of population;
- Closing of small businesses⁸⁶;
- Individuals and businesses and farms will have to travel farther to get goods and services;
- Loss of tax base to support such services as police, fire and waste removal;
- Loss of anchor institutions:
 - Closing of schools so that, for example, children would have exhausting rides to and from schools, and interaction between schools and families would be difficult; and
 - Fewer patients at hospitals and clinics would lead to closing of these facilities which would result effects on general health and the healthcare system; and
- Decline of the towns that anchor the rural service area. Such towns are generally considered very good places to raise families, and families would be forced to move to areas that are not always good places to raise children. People move to and live in small towns and rural areas because they generally want that slower paced life-style.

⁸⁵ US Dept of Labor - Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey - Data extracted on: June 27, 2010 (12:59:12 PM) found at <http://data.bls.gov/cgi-bin/surveymost>

⁸⁶ This is, of course, contrary to both the belief system and public policy of our country. See, e.g., the Small Business Administration at <http://www.sba.gov/>

In fact these towns and the surrounding areas will be devastated, in the true meaning of that word.

Rate of return has given customers better and continually improved services because the local folks running the carriers have incentive in rate of return regulation to improve quality of service and in this respect local control and involvement provides incentive for improved services

This local control should not be taken away and given to the federal government on an untested hope. Local board of directors and employees alike know the community and what the community needs and can therefore serve it better; they have a stake in the success of providing the needed services. Large telecommunications providers will have no urgent business interest in providing satisfactory service and good customer relations because the rural areas comprise such a small percentage of their entire service area. It is merely sound business practice to focus the company's efforts into areas with the largest population of customers. The proposal as written will take away local control and give control to bureaucrats in D.C. and to major corporations with no real stake in the communities (unlike local boards of directors, general managers, and employees living in or near the community served, etc.).

Price caps as presented will not work for rural rate of return carriers

Incentive regulation works only when you have a high density population base in urban areas where costs can be spread. By redirecting the USF for rural carriers and forcing incentive regulation, there will be no means for carriers to recoup their fees other than through increased local rates. This contradicts the Act which requires rural rates to remain comparable to urban rates. It could well be that hundreds of companies go bankrupt, people are left with no service in rural areas, and billions of loans are defaulted on. These events will certainly not lead to savings as proposed by the NBP. In addition, the proposal to incorporate incentive regulation ultimately is at odds with the ARRA, BTOP and BIP. For example, requiring rate of return based carriers to convert to price caps will not only have the most certain effect of destroying small businesses but also will undoubtedly put small rate of return carriers out of business shortly after the BTOP

and BIP programs have released hundreds of millions of dollars in grants and loans for these companies to expand broadband in their service areas.

Reverse auctions are not a viable option for rate of return-based carriers

As stated earlier, Alexicon provides management, financial, and regulatory consulting services to a variety of small⁸⁷, rural/insular, independent, and Tribal telecommunications providers in twelve (12) states. Alexicon's clients range in geographic size from single wire-center companies to larger providers with multiple wire-centers. All of Alexicon's clients are highly dependent upon the existing flow of funds from the Federal USF and most are contributors to the fund.⁸⁸ Alexicon asserts that the continued underlying assumption (or apparent rationale) for the Commission's consideration of reverse auctions as a method of determining high-cost universal service support is that there would be significant fund savings as compared to existing high-cost determination methodologies. There has been no previous empirical data presented in support of this theory and in our opinion nothing new has recently been presented in support of this theory. While reverse auctions may, in some other instances and circumstances, provide some type of economic benefits, there is no documented evidence that they would produce similar benefits in the determination of rural universal service support. Perhaps if there were either some "trial experiments" or related academic research (supported by real-world activities) that provide some indication of positive economic benefit(s) without detrimental effects to customer service, then Alexicon may be more open to the further development and exploration of the concept of reverse auctions for determining high-cost USF support.

Another concern we have is that a reverse auction process, in the context of replacing existing "cost-based" recovery rules, may well lead to unfettered vastly increased bid amounts to replace existing high-cost support levels. Not only would there be the potential for bidder collusion and/or possible other forms of anticompetitive behavior in the bid process, but also the auction process would lack the existing protective layers of cost development review inherent in the

⁸⁷ Under the Regulatory Flexibility Act of 1980, as amended, they all have fewer than 1,500 employees, and are not dominant in their field of operations, 15 U.S.C. 632; and further are Incumbent Local Exchange Carriers ("ILECs") as defined in the 1996 Telecommunications Act, providing less than fifty thousand (50,000) access lines

⁸⁸ Consistent with Section 254 (d), 47 U.S.C. 151, with the exception of any ILEC who's contribution(s) qualify for the *de minimus* exemption

current process. In addition to significant inclusionary rules being in place, there are multiple review layers in today's processes: carrier diligence/supervision/management; independent financial auditing preparation and review; the National Exchange Carrier Association ("NECA") review of submitted data; review by the Universal Service Administrative Company ("USAC"); and finally oversight by the FCC. All of this review occurs in conjunction with the acceptance of submitted company-specific and industry data. Furthermore, the existing process compensates carriers only after a threshold of investment/expense is incurred in excess of a computed "national average cost per loop." This threshold and comparative high-cost basis of recovery would be lost in an auction process and in our view would most certainly lead to increased overall high-cost USF determination in the future.

On April 10, 2007 several members of Congress submitted a letter to then Chairman Martin on the use of reverse auctions as a method to determine high cost universal service support for ETCs.⁸⁹ In that letter, the Congressmen noted several devastating points to the use of reverse auctions:

- "We write you today to inform you that using reverse auctions to disburse universal service funds would be a mistake that threatens to cripple the availability of reliable telecommunications services to rural Americans, and we, therefore, strongly oppose reverse auctions."
- "Our concern is that under reverse auctions the residents of Rural America will not have the same benefits to advanced telecommunications services."
- "We have serious concerns about whether quality service at reasonable and affordable rates can be assured under a reverse auction approach. The mere fact that the service provision would go to the lowest bidder makes the reverse auction concept suspect in its ability to fulfill the mandate of Congress."
- "If the quality of service available to rural residents is noticeably worse than the quality of service available to urban residents as a result of reverse auctions, then the Commission is not fulfilling its mandate."
- "A reverse auction raises questions about predictability because support to eligible providers would be temporary. It implicates sufficiency because a reverse auction would create incentives to underbid, which could result in the underfunding of networks."
- "Even if the Commission concludes that it has the authority to use reverse auctions for USF disbursements absent congressional direction, we oppose this approach because of the numerous problems inherent in it."

⁸⁹ Letter submitted on 4-10-07, "In re Federal State Joint Board on Universal Service Request for comment on the Merits of Using Auctions to Determine High Cost Universal Service Support, WC Docket No. 05-337; CC Docket No. 96-45, signed by Lee Terry, Rick Boucher, and Chip Pickering

Based on the above concerns alone, Alexicon respectfully suggests that reverse auctions are not, and will not, become a viable method for the determination of high-cost USF support. As contained in these Comments, Alexicon believes that there are more important and urgent items that should be considered in any review of the Federal USF program.

VII. THE RESULT OF THE PROPOSED RULE, IF PASSED AS WRITTEN, COULD CONSTITUTE AN UNCONSTITUTIONAL REGULATORY TAKING WITHOUT JUST COMPENSATION.⁹⁰

Under the NOI/NPRM, when the incumbent carrier is not the winner in a reverse auction, existing network infrastructure would either be valued as scrap if the winner did not take over the infrastructure or the winner would take over the infrastructure and the incumbent would lose/default on the property itself. Reimbursement would therefore be due incumbent companies who do not win in a reverse auction scenario. The question of what happens to the incumbent rural carriers' infrastructure if another company "wins" the bid is the issue underlying the Constitutional "taking" analysis. The NOI/NPRM is silent about this fundamental and essential issue. The NBP "assumes that existing networks will be available on an ongoing basis without taking into consideration the role of existing universal service support. For example, if a carrier in a high-cost area uses high-cost support to make voice and broadband available to eighty-five percent of its customers, the National Broadband Plan model estimates the cost of deploying broadband to the remaining fifteen percent, but does not consider the costs associated with the eighty-five percent that already have access to broadband."⁹¹

The issue is thus whether the proposed FCC Rule (that is, its consequences) constitutes a taking under the Fifth Amendment of our Constitution. This regulatory action by the FCC appears to constitute at face value a taking requiring just compensation, based upon the Supreme Court's strong holdings in e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528; 125 S. Ct. 2074; 161 L. Ed. 2d 876 (2005); *Dolan v. City of Tigard*, 512 U.S. 374; 114 S. Ct. 2309; 129 L. Ed. 2d 304 (1994); and many others. Pursuant to these decisions of the United States Supreme Court, the

⁹⁰ U.S. Constitution, Fifth Amendment.

⁹¹ Quoted in paragraph 33 of the NOI/NPRM. The NBP also fails to take into account any universal service support that carriers may currently receive for providing supported telephony services, whether or not they provide broadband. See also Ftn. 76 in the NOI/NPRM.

proposed FCC regulatory action is an uncompensated taking of property in violation of the takings clause of the Federal Constitution's Fifth Amendment. The Supreme Court addressed the issue in *Lingle*, reviewing its prior rulings and explaining the analysis needed for a regulatory taking. The Court held that regulatory actions generally will be deemed *per se* takings for Fifth Amendment purposes (1) where government requires an owner to suffer a permanent physical invasion of her property; or (2) where regulations completely deprive an owner of "all economically beneficial use" of his property. The goal is to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property, and so the focus is upon the severity of the burden that government imposes upon property rights.⁹² Alexicon believes the regulatory taking presented in the NOI/NPRM falls within category (2) as described above by the Supreme Court and is therefore a *per se* taking. If, as Supreme Court case law makes clear, the FCC's actions are considered a "*per se* taking" requiring reimbursement under the Fifth Amendment, the next crucial question that arises is "Who would pay the reimbursement?" Constitutional challenges to the proposed Rule will lead to a delay of implementation even if the Rule were found constitutional because it's very likely that some plaintiffs will seek stays in the judicial district that the cases are tried in and the stays may well be granted. If the government does not acknowledge that the proposed reverse auction constitutes a "taking", there could likely be court challenges and demands for reimbursement. Even if the government acknowledges the carriers have a right to reimbursement, "taking" cases go to court fairly often. If similar situations in the past are any indication, property owners will go to court to argue value if just compensation is not offered.⁹³

VIII. TRIBAL CONSIDERATIONS

In this proceeding, the Commission "encourages input from Tribal governments on all of these issues and specifically asks whether there are any unique circumstances in Tribal lands that would necessitate a different approach." While Alexicon is not a Tribal government, we believe it is important to address Tribal Nations as a critical and interlaced segment of the Nation's

⁹² *Lingle*, 544 U.S. at 537-38.

⁹³ A search using Lexis™ for reported cases in state and federal courts yielded 109 cases. This number does not include state trial court cases that were not appealed. E.g., *Lingle, v. Chevron U.S.A. Inc.*, 544 U.S. 528; 125 S. Ct. 2074; 161 L. Ed. 2d 876 (2005).

telecommunications network and speak to the fact that they indeed have unique circumstances that need addressed.

The Commission notes, in their own language, that the “current system of high cost support has achieved considerable success, helping ensure access to affordable, voice services in all regions of the nation”⁹⁴. What needs to be clearly stated is that the current high cost programs and associated mechanisms provide for last mile connectivity, including FTTH deployment (high cost loop USF and ICLS USF) and Local Switching Support (i.e. soft switches). In general, most of Alexicon’s clients have 80% to 95% of their entire Cable & Wire Facility network in last mile-type plant. Based on FCC data and various publicly available documents, the penetration rate in Indian Country is still well below the National level. The current system provides for very necessary emergency response public safety considerations as well as basic service for Tribal customers, and is therefore still very pertinent and relevant.

If the FCC enforces the current NBP as written, there will be a considerable amount of underfunding at the rural ILEC level. This means that local rates will need to be raised; state rates will need to be raised; financing companies like RUS, CoBank, RTFC, etc. may not get repaid; jobs will be lost in rural America; and network infrastructure will not continue to get built out. This specifically goes against Section 254 of the Act regarding “affordability” of rates and puts local consumer rates at risk. More importantly for Tribal entities is that this will put more pressure on Lifeline customers in Indian Country due to increased state and local costs and will delay getting those customers hooked up due to lack of resources incurred by the Tribal ILEC.

Lifeline is mentioned in the NBP but not mentioned in the current NOI/NPRM. Since the majority of a Tribal carrier’s customers (and those customers living on Indian lands in general) are Lifeline-eligible, this is very concerning due to the lack of attention it is getting with the current NOI/NPRM. In addition, if the FCC enforces the NBP as written/contemplated, there will be increased costs to Tribal ILECs to transition to and provide SIP services for customer

⁹⁴ NOI/NPRM para 3

premise equipment and basic hook up. In addition, 911 and public emergency considerations come into play since SIP service is currently substandard to current TDM/POTS service for public safety and 911 reasons. Overall, Lifeline/LinkUp considerations are arguably the single most concern to Tribal ILECs and those customers living on Tribal lands and Alexicon notes there are currently no specifics about how this issue will be addressed, calculated, or treated in the CAF.

Lastly, Alexicon believes footnote 46 of the NOI/NPRM properly addresses recognition of and definitions for “Tribal Lands” with the following exception: Tribal lands are typically in geographically isolated locations where small pockets of Native American groups are served. For those reasons, the costs associated with delivering broadband services are very high to those areas. In this respect, Alexicon believes it would be appropriate to include Native Hawaiians with American Indians and Alaska Natives in consideration of the NBP as well as this current NOI/NPRM. As with all Tribal Nations, the goal is to make broadband services available at affordable rates and therefore achieve higher penetrations levels for these native groups.

CONCLUSION

For the reasons stated herein, Alexicon respectfully rejects the following concepts as a solution to assist in transitioning the current USF mechanism to a broadband-based “Connect America Fund” for rate of return carriers:

- Incentive regulation (i.e. price caps);
- Reverse auctions;
- Use of a proxy cost model;
- Frozen ICLS support levels

Alexicon commends the Commission and the Joint Board for their continued efforts in reviewing high-cost universal funding and continuing the dialog regarding Section 254 requirements and updates. We are, however, extremely concerned by the lack of implementation details, data

analysis (cost/benefit, etc.), basic universal service necessity, or other specifics related to the proposed changes could have on participants and consumers in the Commission's current NOI/NPRM.

Alexicon believes this NOI/NPRM has been presented without reference to Provider of Last Resort, Lifeline or Link-Up programs. For the reasons discussed in these comments, the NBP proposal of somehow migrating legacy voice services to more expensive broadband services while reducing funding is simply not feasible. The changes proposed by the NOI/NPRM, particularly reverse auction, will for most small rate of return carriers have a negative impact on service levels because the competition would be for the least amount of financial support necessary, rather than for high-quality service. This is contrary to the goals of the USF and this Commission. Alexicon believes it is important that any proposed changes to current rules, regulations, and supported services are accomplished only after in-depth analysis of data supporting the proposals. We suggest that the FCC consider developing a process similar to that of the previous Rural Task Force and specify a timeframe in which recommendations must be made available for public comment and potential implementation.

RECOMMENDED ALTERNATIVES

As stated above, Alexicon would like to offer the following options and alternatives for contemplation by the Commission:

- Withdraw the current NOI/NPRM and later present a proposal that is aligned more closely with the NBP recommendations discussed above in Section II herein;
- Withdraw the NOI/NPRM but issue a new NOI that proposes a demonstration project involving a small number of rate-of-return rural carriers that represent: diverse operations; diverse geographical and demographic areas; and diverse challenges;
- Withdraw the NOI/NPRM and only then, if the rural system needs reformed, re-establish a Rural Task Force to study the facts and issues and accomplish this goal. The Joint Board in past years acknowledged that this is the approach that needs to be done and

recommended that the FCC deal with price cap regulation in its own dockets and rural in its own

- Provide an option for rate of return carriers. It is well-documented that the Commission recognizes rate of return carriers have unique, challenging, different investment, and cost structures.⁹⁵ With this in mind, the Commission has historically also recognized that providing options to rate of return carriers allows flexibility, simplification, and stability to accommodate their distinctive characteristics.⁹⁶ The Commission also recognized that providing options to rate of return carriers in the Rural Task Force Order was appropriate: “In the Order, we adopt the Rural Task Force’s proposal that rural carriers be given a choice of three different options for disaggregating and targeting per-line universal service high-cost support...”⁹⁷ As referenced in footnote 41 above, since rate of return carriers represent approximately five percent of the total access lines in the Nation, Alexicon believes it to be in the public interest to allow different regulatory treatments for these companies, especially considering the Commission’s previous recognition of and agreement to the disparities between small carriers and larger carriers
- In addressing rate of return carriers only (for reasons presented in these comments and in past comments whereby rate of return should be addressed separately from price cap companies), Alexicon modified the current USF high cost loop algorithm to run a test demonstration on what type of results would materialize if the current algorithm were used to incrementally include broadband and multipurpose-related Central Office plant and Cable & Wire Facility plant separations categories as currently contained in 47 C.F.R. Part 36 rules. This alternate high cost loop algorithm simply includes all wideband/broadband separations categories in addition to the current Central Office 4.13 category and the current Cable & Wire Facility Category 1 plant in the calculation of the “Expense Adjustment.”⁹⁸ The purpose of this “test case” is three-fold: a) to confirm that the current algorithm can indeed be easily modified to accommodate broadband-related separations categories, and therefore show broadband to be an incremental addition to the current algorithm; b) to see if the algorithm discriminates based on the size of the rate of

⁹⁵ CC Docket No. 80-286, FCC 01-162, “Jurisdictional Separations and Referral to the Federal-State Joint Board, Report and Order”, released May 22, 2001, para 21; CC Docket No. 92-135, FCC 93-253, para 2

⁹⁶ CC Docket No. 80-286, FCC 01-162, para’s 11 & 21

⁹⁷ FCC 01-157, “Rural Task Force Order”, released May 23, 2001, para 230

⁹⁸ 47 CFR Part 36.601, Subpart F – Universal Service Fund

return carrier; c) to assist the Commission in its efforts to develop a new “model” that is workable, nondiscriminatory, and *“to estimate support levels for the provision of broadband and voice service in areas that are currently served by broadband with the aid of legacy high-cost support,”*⁹⁹ Alexicon attests, for reasons contained in these comments, that this baseline methodology has been tested, reviewed, and verified and could meet the Commission’s intent under the auspices that “The Commission encourages interested parties to submit such information on the record, however, to assist us in developing an accurate and verifiable federal cost model.”¹⁰⁰ The initial results are as follows:

- a. The alternate algorithm can accommodate the inclusion of broadband-related plant costs and separations categories and produces verifiable and quantifiable results similar to the current mechanism
- b. The alternate algorithm does not discriminate based on the size of the company, but rather is driven from the relationship of broadband and multipurpose plant to the total balance of that given plant grouping. Alexicon ran the test analysis using a 500 access line company; a 4,700 access line company; and a 32,000 access line company
- c. Based on the analysis, Alexicon generally notes that companies would be incented to fully deploy broadband-capable networks if these companies were given certain guarantees and assurances that the Commission would phase in a new broadband-based USF mechanism (using this alternate mechanism or its equivalent) while phasing out specific “POTS” or voice-related plant from the current algorithm such that rate of return carriers would remain financially viable

⁹⁹ NOI/NPRM, para 17

¹⁰⁰ Ibid, footnote 48

Alexicon sincerely appreciates the opportunity to submit these comments in this most important proceeding. Alexicon applauds the Commission in its quest and agrees that broadband deployment should be the cornerstone of future telecommunications in all areas of the United States.

Respectfully submitted,
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